Re Goh Hoe Ling & Anor

HIGH COURT (JOHOR BAHRU) — DIVORCE PETITION NO 33–96–1994
ABDUL MALIK ISHAK J
28 APRIL 1995

Family Law *— Divorce — Deed of separation — Husband and wife mutually agreed that marriage be dissolved — Joint petition for divorce filed subsequently — Petitioner wife later filed notice of discontinuance and notice of withdrawal of consent to joint petition — Whether both parties 'freely consent' to petition — Whether petitioner wife could withdraw consent — Law Reform (Marriage and Divorce) Act 1976 s 52 — Divorce and Matrimonial Proceedings Rules 1980 r 14(2)*

The petitioners were lawfully married on 30 January 1989. The marriage, however, subsequently broke down irretrievably. On 15 April 1994, a deed of separation was prepared where it was stated in explicit terms that 'the husband and the wife have mutually agreed that their said marriage shall be dissolved and they freely consent thereto' ('the deed of separation'). A joint petition for divorce was subsequently filed on 26 April 1994. On 26 August 1994, however, the petitioner wife filed a notice of discontinuance of the joint petition for divorce. On 15 September 1994, she further filed a notice of withdrawal of consent to joint petition. Solicitors for the petitioner husband by a letter dated 11 November 1994 raised two preliminary objections: (i) that the notice of discontinuance and the notice of withdrawal of consent to joint petition were procedurally wrong; and (ii) that the petitioners were bound by the terms and conditions of the deed of separation dated 15 April 1994. The issues before the court were whether both parties had freely consented to the dissolution of their marriage within the meaning of s 52 of the Law Reform (Marriage and Divorce) Act 1976, and whether the petitioner wife could resile from the deed of separation and withdraw her consent.

Held, dismissing the preliminary objections:

(1) In a joint petition for divorce, both the petitioners must be physically present in court so as to satisfy the court that the petitioners 'freely consent' to the dissolution of their marriage (see p 146G); *Sivanesan v Shymala* [1986] 1 MLJ 400.

(2) The material times to consider whether 'both parties freely consent' to file the joint petition and to the terms and conditions of the deed of separation would be on the date of hearings of the petition (see p 147E); *Ong Ah Mai v Ling Pooi Ming* [1984] 2 MLJ 129 followed.

(3) Pursuant to r 14(2) of the Divorce and Matrimonial Proceedings Rules 1980, a respondent to a petition may give notice to the court either that he does not consent to a decree being granted or that he withdraws any consent which he has already given (see p 147I).

(4) Thus, when the petitioner wife filed a notice of withdrawal of consent to joint petition on 15 September 1994, she must in law be deemed to have withdrawn her earlier consent and would be entitled to proceed on a separate basis. This would have the consequential effect of rendering the joint petition to be struck off but with liberty to the parties to file afresh (see pp 147I–148A); *Sivanesan v Shymala* (1986) 1 MLJ 400 followed.

[Bahasa Malaysia summary

Pempetisyen-pempetisyen telah berkahwin secara sah pada 30 Januari 1989. Walau bagaimanapun, perkahwinan ini kemudiannya telah meretak dengan tidak dapat lagi dipulihkan. Pada 15 April 1994, satu suratikatan pemisahan telah disediakan di mana ia telah dinyatakan secara jelas bahawa 'suami dan isteri bersama-sama bersetuju supaya perkahwinan mereka dibubarkan dan mereka memberi persetujuan dengan bebas'. Satu petisyen bersama untuk bercerai telah difailkan pada 26 April 1994. Walau bagaimanapun, pada 26 Ogos 1994, pempetisyen isteri telah memfailkan satu notis pemberhentian untuk petisyen perceraian. Pada 15 September 1994, dia telah memfailkan lagi satu notis menarik balik persetujuan untuk petisyen bersama lagi. Peguamcara untuk pempetisyen suami melalui surat bertarikh 11 November 1994 telah membangkitkan dua bantahan permulaan, iaitu: (i) notis pemberhentian dan notis menarik balik keizinan untuk petisyen bersama adalah salah dari segi prosedur; dan (ii) pempetisyen-pempetisyen adalah terikat kepada syarat dan keadaan suratikatan pemisahan bertarikh 15 April 1994. Isu dalam kes ini adalah sama ada kedua-dua pihak 'bersetuju dengan bebas' untuk membubarkan perkahwinan mereka di bawah maksud s 52 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976, dan sama ada pempetisyen isteri boleh mengingkari suratikatan pemisahan dan menarik balik persetujuannya.

Diputuskan, mengenepikan bantahan permulaan:

(1) Dalam suatu petisyen bersama untuk penceraian, kedua-dua pempetisyen harus hadir di mahkamah secara fizikal untuk memuaskan mahkamah bahawa mereka 'bersetuju dengan bebasnya' terhadap pembubaran perkahwinan mereka (lihat ms 146G); *Sivanesan v Shymala* [1986] 1 MLJ 400 diikut.

(2) Masa yang material untuk menentukan sama ada 'kedua-dua bersetuju dengan bebasnya' untuk memfailkan petisyen bersama dan terhadap terma dan syarat suratikatan pemisahan adalah pada hari pembicaraan petisyen (lihat ms 147E); *Ong Ah Mai v Ling Pooi Ming* [1984] 2 MLJ 129 diikut.

(3) Mengikut k 14 (2) Kaedah Prosiding Perceraian dan Hal-Ehwal Suami Isteri 1980, penentang kepada suatu petisyen boleh memberi notis kepada mahkamah untul menyatakan sama ada dia tidak bersetuju bahawa suatu dikri diberikan, atau dia ingin

menarik balik apa-apa persetujuan yang dia telah beri (see p 147I).

(4) Apabila pempetisyen isteri memfailkan notis menarik balik persetujuan untuk petisyen bersama, dia mestilah dari segi undang-undang disifatkan telah menarik balik persetujuan yang pernah diberinya dan berhak menerus pada dasar lain. Ini akan mengakibatkan petisyen bersama dibatalkan tetapi dengan kebebasan kepada kedua-dua pihak untuk memfail semula (lihat ms 147I–148A); *Sivanesan v Shymala* (1986) 1 MLJ 400 SC diikut.

Notes

For cases on divorce, see 7 *Mallal's Digest* (4th Ed) paras 1516–1616; [1989] Mallal's Digest 843–845; [1990] Mallal's Digest 653–655; [1991] Mallal's Digest 1167–1175; [1992] Mallal's Digest 1015–1030; [1993] Mallal's Digest 820–823; [1994] Mallal's Digest 1393–1407.

Cases referred to

Beales v Beales [1972] 2 All ER 667
Edgar v Edgar [1980] 3 All ER 887
Mason v Mason [1972] 3 All ER 315
McG (formerly R) v R [1972] 1 All ER 362
Ong Ah Mai v Ling Pooi Ming [1984] 2 MLJ 129
Peer Mohamed bin Abdul Aleez v Pahang Investments Public Ltd Co (Companies (Winding-up) Petition No 42-67-86) (unreported)
Sivanesan v Shymala (1986) 1 MLJ 400 SC

Legislations referred to

Divorce and Matrimonial Proceedings Rules 1980 r 14 (2)
Law Reform (Marriage and Divorce) Act 1976 s 52
Divorce Reform Act 1969 ss 2(1)(d), 2(6) [UK]
Matrimonial Causes Rules 1968 r 12 (6) [UK]

Adi Radlan bin Tan Sri Abdul Rahman (*Mak, Ng, Shao & Kee*) for the petitioner husband.

Jagjit Singh and *RK Menon* (*RK Menon & Co*) for the petitioner wife.

Abdul Malik Ishak J: The facts of this particular case are simple and straightforward. The petitioner husband Goh Hoe Ling and the petitioner wife Chan May Hee (f) were lawfully married on 30 January 1989 at the Registry of Marriages, Johor Bahru. After marriage, they cohabitated at No 242, Jalan Serampang, Taman Pelangi, Johor Bahru which transpired, in the course of submission, to be a double storey semi-detached house. A daughter was born, out of this union on 11 June 1989, and her name is Goh Su Phier (f). Somehow, the magic sparkle to the marriage disappeared and that marriage broke down irretrievably. Both the petitioners mutually

agreed that their marriage should be dissolved and they freely consent thereto. A

On 15 April 1994, a deed of separation was prepared by Mr Song Sing Lik, an advocate and solicitor practising in Johor Bahru, for the petitioners. Recital 2 of the deed of separation in explicit terms stated that 'the husband and the wife have mutually agreed that their said marriage shall be dissolved and they freely consent thereto'. As the deed of separation is hotly debated and is a subject of dispute, it is appropriate to reproduce the relevant parts here. B

Now this deed witnesseth as follows:

1 In further pursuance of the said agreement and in consideration of the premises the husband and the wife mutually covenant and agree with each other as follows: C

(1) that they shall each live separate and apart from and free from the marital control of the other and neither of them shall molest annoy disturb or interfere with the other or his or her relations friends or acquaintances or in his or her profession or business. D

(2) that the said child of the marriage shall remain in the care and control of the wife but the husband may have reasonable access to her; and

(3) that the terms of the joint petition for divorce shall be as follows:

(a) that the said marriage may be dissolved; E

(b) that the wife shall have the care and custody of the said child with reasonable access to the husband;

(c) that the husband shall pay a lump sum of RM100,000 to the wife;

(d) that no maintenance shall be payable by the husband for the said child; F

(e) that the costs of the petition shall be borne by the husband.

2 In consideration of the premises the husband hereby covenants with the wife as follows:

(1) within six (6) months from the date hereof the husband shall pay the wife the said lump sum of RM100,000 or immediately upon a two-weeks' notice given by the wife in writing; and G

(2) the husband shall permit the wife (if she so wishes) to remain in the matrimonial home known as No 242, Jalan Serampang, Taman Pelangi, Johor Bahru until the full payment of the said lump sum of RM100,000. H

3 The wife hereby covenants with the husband as follows:

(1) the wife shall at all future times out of the provision herein made for her as aforesaid or otherwise and in all respects support and maintain herself and support maintain bring up and educate in a manner suitable to her position in life the said child while living with her or under her control and provide and pay for all such board lodging clothes medical attendance tuition instruction and other matters and things as she or the said child may require; and I

(2) that the husband may have reasonable access to and communication with the said child while under the care and control of the wife;

A 4 The husband and the wife hereby agree that without prejudice to the wife's rights the wife may at her sole discretion allow the said child to stay with the husband while the said child is under her care and control ...

In due course, a joint petition for divorce was filed on 26 April 1994, B though it was dated 22 April 1994, and this was done in the Johor Bahru High Court vide divorce Petition No 33-96-1994 (enclosure 2). In that joint petition, the petitioners sought for the following prayers:

(a) that the said marriage may be dissolved;

(b) that the petitioner Goh Hoe Ling shall pay a lump sum of RM100,000 C to the petitioner Chan May Hee (f);

(c) that the petitioner Chan May Hee (f) shall have custody of the said Goh Su Phier (f) with reasonable access to the petitioner Goh Hoe Ling;

(d) that no maintenance shall be payable by the petitioner Goh Hoe Ling D for the said child Goh Su Phier (f); and

(e) that the costs of this petition be borne by the petitioner Goh Hoe Ling.

A statement as to the arrangement of the petitioners' only child – Goh Su Phier (f) was filed on 26 April 1994, though it was dated 22 April 1994. In that statement, proposed arrangements for the child, in the event the E decree being granted, were briefly itemized (enclosure 4). It covered the following areas:

(a) Residence

The said child shall stay with the petitioner Chan May Hee (f).

(b) Education, etc F

The petitioner Chan May Hee (f) will be responsible for the future education and training of the said child.

(c) Financial provision

The petitioner Chan May Hee (f) will support and provide monetary maintenance to the said child. G

(d) Access

It has been proposed by the petitioner Chan May Hee (f) that the petitioner Goh Hoe Ling shall have free and easy access to the said child.

H Up to this stage, the petitioners were represented by the same solicitors, Messrs SK Song.

On 22 August 1994, the petitioner Chan May Hee (f) changed solicitors to Messrs RK Menon & Co as reflected in enclosure 8. This change marked the beginning of trouble, and trouble manifested itself when the petitioner Chan May Hee (f) filed on 26 August 1994 a notice I of discontinuance of the joint petition for divorce (enclosure 11) signed by Messrs RK Menon & Co. To confound the matter further, a notice of withdrawal of consent to joint petition (enclosure 16) signed by both the petitioner Chan May Hee (f) and her solicitors, Messrs RK Menon & Co, was filed on 15 September 1994. On 7 November 1994, the petitioner

Goh Hoe Ling changed solicitors to Messrs Mak, Ng, Shao & Kee and a notice of change of solicitors was filed to that effect (enclosure 23). Earlier on, to be precise, on 26 October 1994 (see enclosure 18), the matter was fixed for mention before my immediate predecessor, but somehow, the matter did not get off the ground. Be that as it may, Mr Adi Radlan bin Tan Sri Abdul Rahman from Messrs Mak, Ng, Shao & Kee, the learned counsel for the petitioner Goh Hoe Ling, by letter dated 11 November 1994 addressed to the High Court (No 2), Johor Bahru with a copy to Messrs RK Menon & Co (enclosure 24), raised two preliminary objections. First, that the notice of discontinuance (enclosure 11) and the notice of withdrawal of consent to joint petition (enclosure 16) were procedurally wrong, as they went outside the scope of the Rules of the High Court 1980 (the 'RHC'), and the Law Reform (Marriage and Divorce) Act 1976. Secondly, that the petitioners were bound by the terms and conditions of the deed of separation dated 15 April 1994; this meant that the petitioner Chan May Hee (f) could not resile from it. Mr Jagjit Singh and Mr RK Menon argued with vigour and ability to the effect that this court is not precluded to go behind the deed of separation and to strike that deed down as the petitioner Chan May Hee (f) has changed her mind and would petition unilaterally for divorce and claim the relevant reliefs thereto. Before me, Mr Adi Radlan bin Tan Sri Abdul Rahman ably argued and amplified his arguments by resorting to an analogy of an old unreported judgment of the late Ajaib Singh J (as he then was) in *Peer Mohamed bin Abdul Aleez v Pahang Investments Public Ltd Co* (Companies (Winding-up) Petition No 42-67-86) where his Lordship said in relation to a winding-up petition:

> But there is no provision whatsoever in the Companies (Winding-up) Rules or in the Rules of the High Court for a petition to be discontinued once it is filed in court. Once filed the petition has to be dealt with under section 221 of the Companies Act or under rule 33 of the Winding-up Rules.

By way of an analogy, Mr Adi Radlan bin Tan Sri Abdul Rahman argued that likewise here, the petitioner wife should be barred from filing the notice of withdrawal of consent to joint petition in enclosure 16 as the joint petition in enclosure 3 are now before this court and should be disposed of under the provisions of the Law Reform (Marriage and Divorce) Act 1976 to its finality. Mr Adi Radlan bin Tan Sri Abdul Rahman impressed upon me that the petitioner husband here has paid RM45,000 to the petitioner wife in compliance with cl 2 (1) of the deed of separation and, indeed, the petitioner husband was said to be desirous of paying the balance sum of RM55,000 to make it a grand total of RM100,000. To this, Mr Jagjit simply replied that the sum of RM45,000 should be considered as a gift by the petitioner husband to the petitioner wife and, consequently, if that gift was not returned, it can be considered as a debt, pure and simple. I may add that, as a debt, the petitioner husband can file a claim in court and pursue the matter further.

It is crystal clear that from the facts as set out by me, the deed of separation was entered into by both the petitioners with full knowledge of all the facts and circumstances and with the benefit of legal advice. Messrs

A SK Song, an advocate and solicitor, was the common solicitor for both petitioners and the deed of separation was prepared by that common solicitor. Considerable attention must therefore be paid not only to the deed of separation but also to the circumstances that led to the signing of that deed. It is here that extreme difficulty arises. There is, unfortunately, no material at all for me to rely upon, except to look to the contents of the B joint petition in enclosure 2 which, sad to say, contains precious little. There is no material to show as to why the petitioner wife decided to resile from the deed of separation. There is also no reason advanced as to why the petitioner wife now decides to disregard the advice of her solicitors – Messrs SK Song. There is also no material to show that the petitioner C husband is wealthy and influential and, in view of his position, had an overpowering effect on the petitioner wife that she might be afraid to lose the custody of her daughter and, consequently, was forced to sign the deed of separation. These are nothing to show that there is a disparity of bargaining power between the petitioner wife and the petitioner husband. There is also nothing to show that the petitioner husband has exploited his D position unfairly to the petitioner wife so as to induce her to sign the deed of separation. Put differently, there is no material to show that the petitioner wife was put to extreme disadvantage when she signed that deed of separation. I must admit that this is an extremely difficult case to decide. I suppose 'hard cases make good laws'. Yet another difficulty is this: at no E time did Mr Jagjit Singh or Mr RK Menon say, at the bar, that the petitioner wife was pressurized by the petitioner husband to accept the terms of the negotiations that led to the signing of the deed of separation.

The same puzzling scenario of the concluded separation deed reared its ugly head in *Edgar v Edgar* [1980] 3 All ER 887 CA, where Ormrod LJ F in an obvious attempt to solve the impasse had this to say (see p 893):

> To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties leading up to the prior agreement, and to their subsequent conduct in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the G circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So the circumstances surrounding the making of the agreement are relevant. Under pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, H are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is I not intended to be an exclusive catalogue.

Ormrod LJ in *Edgar v Edgar* continued further in another part of his judgment:

> Adapting that statement to the present case, it means that the wife here must offer prima facie evidence of material facts which show that justice

> requires that she should be relieved from the effects of her covenant in clause 8 of the deed of separation, and awarded further capital provision.

It is germane to mention here that since Ormrod LJ in *Edgar v Edgar* found that there was no evidence of adverse conduct by the husband during the negotiations leading to the agreement and no adequate explanation of the wife's conduct in agreeing, against the advice of her lawyers, not to claim a lump sum on divorce and then going back on the agreement and claiming a lump sum, and since it had not been shown that justice required the court to relieve her from the agreement, Ormrod LJ held that she had not established that the court was justified in going behind the agreement. Accordingly, Ormrod LJ dismissed the wife's application for a lump sum and allowed the husband's appeal.

Am I supposed to follow the footsteps of Ormrod LJ in *Edgar v Edgar* and go behind the deed of separation in the present case and rule in favour of the petitioner Chan May Hee (f)? It is not that easy as it appears to be.

Enclosure 2, para 5 thereof contains this passage:

> The petitioners have mutually agreed that their marriage should be dissolved and they freely consent thereto.

The words 'freely consent' seem to have been imported from s 52 of the Law Reform (Marriage and Divorce) Act 1976 which enacts as follows:

> If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the Court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit.

From the language employed, it appears that under s 52 of the Law Reform (Marriage and Divorce) Act 1976, before the court proceeds to grant a decree nisi, it must be satisfied that:

(i) two years have elapsed from the date of marriage;

(ii) both husband and wife have freely consented;

(iii) proper provisions have been made for the wife; and

(iv) proper safeguards have been made for the support, care and custody of the 'children of the marriage', if any.

VC George J (now JCA) in *Ong Ah Mai v Ling Pooi Ming* [1984] 2 MLJ 129 in relation to s 52 of the Law Reform (Marriage and Divorce) Act 1976 had this to say (see p 131):

> A condition precedent to the presentation of a joint petition is a mutual agreement and the Court will only dissolve the marriage upon being satisfied that proper provision is made for the wife and for the children. The section calls for such an agreement. But it is for the court to decide whether the provisions the parties had agreed to are proper at the hearing of the joint petition.

Now, by way of an analogy, the word 'consent' under s 2(1)(d) of the English Divorce Reform Act 1969 has been lucidly construed by Sir George Baker P in *Beales v Beales* [1972] 2 All ER 667 in the following words:

> More generally, however, the 1969 Act provides that 'the respondent consents to a decree being granted'. This is a deliberate use of the present tense when 'has consented' could have been used. The only possible conclusion is that the consent must continue to decree nisi and consequently must be a valid, subsisting consent when the case is heard. It must remain operative as the expression of the respondent's state of mind up to the moment when the decree is granted. There is the all–too familiar case of the man who, having said he does not wish to defend, changes his mind but does not say so until the hearing of the undefended suit. As status is involved, he is almost invariably given the opportunity of defending conditional on his paying some costs, and the hearing is adjourned.

Next, the facts in *McG (formerly R) v R* [1972] 1 All ER 362 were that the wife petitioned for divorce under s 2(1)(d) of the Divorce Reform Act 1969 on the ground that the marriage had irretrievably broken down, it being alleged that the parties had lived apart for a continuous period of at least two years, and the husband had consented to a decree being granted. The petition was filed three days after the coming into force of the 1969 Act. In accordance with s 2(6) of the 1969 Act and rule 12 (6) of the Matrimonial Causes Rules 1968, as amended in consequence of the coming into force of the 1969 Act, the wife was required to send to the husband with the notice of proceedings an acknowledgement of service in the form prescribed in Appendix II to the 1968 rules containing the question, 'Do you consent to a decree being granted?' By mischance, the wife's solicitors sent a form of acknowledgement in the old form which had been in force prior to the commencement of the 1969 Act and which contained no reference to the husband's consent. There was no evidence that the husband was opposed to or consented to a decree except a letter from his solicitors stating that he 'simply wants this affair to be brought to finality as soon as possible'. It was contended by the wife that compliance with the rules concerning the proper form of acknowledgement was not mandatory, and that the letter from the husband's solicitors amounted to a consent for the purposes of s 2(1)(d) of the 1969 Act. It was held, inter alia, that whether or not compliance with the rules was mandatory, it could not be inferred from the fact that the husband had not objected to a decree being granted that he had thereby 'consented' within the meaning of s 2(1)(d), for consent was a positive requirement.

Bromley's Family Law (7th ed) at p 202, contains passages that merit reproduction:

> The respondent must affirmatively consent to the decree: it is not sufficient that he does not oppose it (*McG (formerly R) v R* [1972] 1 All ER 362). It follows that a petitioner cannot seek a decree relying on this fact if the respondent cannot be found or cannot give a valid consent because of mental illness. The mental capacity required to give a consent to the dissolution of a marriage is the same as that required for its formation: did

> the respondent understand the nature and consequences of what he was doing? (*Mason v Mason* (1972) 3 All ER 315). He must be given such information as will enable him to understand the effect of a decree being granted. He may withdraw his consent at any time before a decree nisi is pronounced, and if he does so (or does not give his consent in the first place) and two years' separation is the only fact alleged by the petitioner, the proceedings must be stayed.

It was submitted before me that the consent which the petitioner wife Chan May Hee (f) gave when the joint petition was filed on 26 April 1994 had gone stale. It was further submitted that even the consent in recital 2 of the deed of separation as reproduced in the early part of this judgment suffers from the same impediment because it was prepared on 15 April 1994. What was crucial, it was submitted, was that this court must be 'satisfied that both parties freely consent' within the meaning of s 52 of the Law Reform (Marriage and Divorce) Act 1976 on the date of the hearing of the joint petition (enclosure 2). I was invited to ask the petitioner wife Chan May Hee (f) whether she freely consents to, firstly, the joint petition for divorce and, secondly, to the terms and conditions of the deed of separation. I did just that and the answers were in the negative. Time and again the present tense employed by the legislature in s 52 of the Law Reform (Marriage and Divorce) Act 1976, particularly the words 'both parties freely consent', was highlighted and emphasized. This was done to drive home the message that had the legislature thought it fit to employ words in the past tense like 'both parties have freely consented' in s 52 of the Law Reform (Marriage and Divorce) Act 1976, then both the joint petition that was filed on 26 April 1994 and the deed of separation that was prepared on 15 April 1994 would not have gone stale like a piece of cake, so to speak, and, consequently, would still be binding on both the petitioners.

In my judgment, in a joint petition for divorce, both the petitioners must be physically present in court so as to satisfy the court that the petitioners 'freely consent' to the dissolution of their marriage and whether proper provisions have been made for the wife, and finally, whether proper safeguards have been made for the support, care and custody of the 'children' to the marriage, if any, I can do no better than to quote the sage observations of Lee Hun Hoe CJ (Borneo) (as he then was) in *Sivanesan v Shymala* [1986] 1 MLJ 400 SC where his Lordship said (at p 402):

> In answering the common question of law whether the mere mutual consent of the petitioners to the dissolution of a marriage is the sole criterion for the grant of the decree nisi, the learned judge had been very critical of the ease in obtaining mutual divorce. He has made many suggestions. Some are very constructive and worthy of support. However, there are others which are doubtful and should not be allowed to stand and create confusion. He complained that in many cases the petitioners do not bother to come to court. Our answer is that petitioners must appear in court for the court may wish to satisfy itself by questioning them as to whether they freely consent to the dissolution of their marriage and whether the provision for the wife and for the support, care and custody of the children, if any, are fair and reasonable. It may, after questioning, even attach other conditions if it thinks fit.

A In laying down a uniform procedure and practice for the whole country in respect of mutual divorce, Lee Hun Hoe CJ (Borneo) (as he then was) in the same case had this to say (see p 404):

> Where the joint petition is signed by the solicitors representing the spouses such petition shall be supported by separate affidavits or joint affidavit sworn to by the spouses. In the affidavit the spouses should state their domicile. The validity of a decree of divorce is determined by the law of the parties' domicile. The parties must also state that they freely consent to the mutual divorce and agree to the terms or conditions which are set out clearly and concisely in the joint petition. In making the decree it is not unusual for a judge to give either spouse reasonable access to the children with liberty to apply. In the case of maintenance he will usually also give liberty to apply. These are matters which the spouses usually accept and give their consent to be included in the decree. Where children are involved it is not unusual for the spouses to attach to the affidavit a statement of arrangements for the children. The statement will contain particulars of the children concerned, their residence, education, health and financial provision and question of access. If any new term or terms are to be added then the spouses should be allowed to amend the joint petition. The court should disregard any affidavit put in by any party in an attempt to vary any of the terms of the joint petition.

On appraisal of the authorities as set out above, it is my judgment that the material times to consider whether 'both parties freely consent' to file the joint petition in enclosure 2 and whether 'both parties freely consent'to the terms and conditions of the deed of separation would be on the date of the hearings before me. Consequently, this court is entitled to embark on an assignment to go behind the deed of separation and ascertain 'the question of justice between the parties'. To quote VC George J (now JCA) in *Ong Ah Mai v Ling Pooi Ming*, the court has to 'decide whether the provisions the parties had agreed to are proper at the hearing of the joint petition.' Mr Jagjit Singh addressed me from the bar and he told me that the petitioner wife Chan May Hee (f) was unwilling to vacate the matrimonial house as she now realized that the house has an expensive price tag on it. Indeed, I can take judicial notice that prices of residential houses in Johor Bahru have gone up by leaps and bounds beyond the reach of the Johoreans. A double storey semi-detached house at Taman Pelangi which is the matrimonial house, in the present case, can easily sell at RM500,000 – this must have been the factor that had induced the petitioner wife Chan May Hee (f) to have a change of heart. Now, the pertinent question to pose is this: can the petitioner wife Chan May Hee (f) resile and now say that she is withdrawing her consent? The answer is found in r 14(2) of the Divorce and Matrimonial Proceedings Rules 1980 where it is stated as follows:

> A respondent to a petition which alleges any such fact under paragraph (1) may give notice to the Court either that he does not consent to a decree being granted or that he withdraws any consent which he has already given.

Thus, when the petitioner wife Chan May Hee (f) filed a notice of withdrawal of consent to joint petition (enclosure 16) on 15 September 1994, she must in law be deemed to have withdrawn her earlier consent and would be entitled to proceed on a separate basis. This would have the

consequential effect of rendering the joint petition (enclosure 2) to be struck off, but with liberty to the parties to file afresh. I am acting cautiously here because 'until the term or condition of proper provision to be made for the wife had been settled and could form part of the decree the court should never grant a decree' (per Lee Hun Hoe CJ (Borneo) (as he then was) in *Sivanesan v Shymala* (1986) 1 MLJ 400 SC. Perhaps it is ideal to reproduce in verbatim that part of the judgment of Lee Hun Hoe CJ (Borneo) (as he then was) in *Sivanesan v Shymala* where his Lordship said this (see p 401):

> What went wrong, in our view, is that the learned judge made an order dissolving the marriage before resolving the exact term or condition for the mutual divorce. He granted the divorce, then adjourned the hearing to deal with the matter of exchange of property in chambers. No children were involved in this case. The only matter the court had to be satisfied with was the proper provision to be made for the wife. Until the term or condition of proper provision to be made for the wife had been settled and could form part of the decree the court should never grant a decree. The terms or conditions must be embodied in the order for the dissolution of marriage by mutual consent. The court may also attach other terms or conditions it deems fit.
>
> The point we would like to stress is that the court should only dissolve the marriage by mutual consent upon such terms and subject to such conditions as agreed by the joint petitioners and accepted by the court as fair and reasonable. What the learned judge should have done was to adjourn the hearing to chambers and clear the confusion surrounding the exchange of properties. Once this has been settled the learned judge could then adjourn the matter to open court and grant an adjournment to enable the spouses to file an amended joint petition incorporating the new agreed terms and conditions. In other words, until the terms and conditions are settled and agreed to in the joint petition or amended joint petition the court should never grant a decree of divorce by mutual consent which is completely different from other forms of divorce.

In the present case, if the petitioners could come to a meeting table and iron out their differences there is no bar for them, if they so minded, to file an amended joint petition incorporating the new agreed terms and conditions. But since the petitioner wife Chan May Hee (f) has rightly withdrawn her consent by filing enclosure 16, which I so hold, she is not prevented to pursue the matter of divorce afresh by filing unilaterally.

For the reasons adumbrated above, the preliminary objections raised by Mr Adi Radlan bin Tan Sri Abdul Rahman must fall like a deck of playing cards. Enclosure 16 was rightly filed. Costs should be given to the petitioner wife Chan May Hee (f).

Preliminary objections dismissed.

Reported by Mariette Peters-Goh